Supreme Court, U.S.
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No. 96-87

In The

Supreme Court of the United States

October Term, 1995

EDWARD DONALD MOODY,

Petitioner,

v.

DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA; DR. WAYNE TEAGUE, in his official capacity as State Superintendent of Education; THE PERSONNEL DEPARTMENT OF THE STATE OF ALABAMA; and DR. HALYCON V. BALLARD, in her official capacity as Director of State Personnel,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a promotion decision, based irrefutably upon a supervisor's considered judgment that the persons selected for promotion were best qualified, constitutes a pretext for age discrimination.

2. Whether a person has a substantive due process right to a particular ranking on a register of persons eligible for promotion, when state law provides for the appointment of any person on the register regardless of position on the register.

3. Whether a promotion decision-making process which is based upon a supervisor's considered judgment that the persons selected for promotion were best qualified subjects older employers to "varying treatment" in violation of the Equal Protection Clause.

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b), Respondents represent to this Honorable Court that the parties to this Petition are all named in the caption of this case. To the knowledge of the Respondents, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondents Department of Education of the State of Alabama and Dr. Wayne Teague, in his official capacity as State Superintendent of Education (hereinafter Education Respondents), urge this Court to deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit being reviewed appear as an appendix to the Petition for Writ of Certiorari. The decision of the United States District Court granting summary judgment in favor of all defendants also appears in the appendix to the Petition.

STATEMENT OF THE CASE

The Education Respondents adopt the Statement of the Case as set out by the Petitioner, with the exception of argumentative commentary appearing in the Statement of the Facts. The Education Respondents adopt the Factual Background as set out by the trial court, which can be found on pages 7a-11a of the Appendix to the Petition.

REASONS FOR DENYING THE WRIT

Review on a Writ of Certiorari "is not a matter of right, but of judicial discretion," to be granted "only for

compelling reasons." Supreme Court Rule 10. The Petitioner cites two reasons for review of the decision of the Eleventh Circuit Court of Appeals: (a) The decision has so far departed from the accepted and usual cause of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's power of supervision, or (b) the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Petitioner's Brief, Page 2. The Petitioner fails, however, to present any issues in this case which compel review by this Court. Indeed, the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's grant of summary judgment, is wholly consistent with existing decisions of this Court, and is therefore not proper for review by this Court.

I. THE DISTRICT COURT WAS CORRECT IN GRANTING THE MOTION FOR SUMMARY JUDGMENT BECAUSE THE STATE DEPARTMENT OF EDUCATION MADE ITS PROMOTION DECISIONS BASED UPON LEGITIMATE, NON-DISCRIMINATORY REASONS, AND THE PETITIONER HAS FAILED TO DEMONSTRATE THESE REASONS WERE A PRETEXT FOR AGE DISCRIMINATION

The district court granted the Education Respondents' Motion for Summary Judgment on the Petitioner's Age Discrimination in Employment Act (ADEA) claim because he failed to prove the Education Respondents' stated reasons for their promotional decisions were a

pretext for age discrimination. R3-68-14-15. Summary judgment is appropriate when a party fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). The district court found that the Petitioner met his initial burden of establishing a prima facie case of age discrimination. The burden then shifted to the State Department of Education to articulate a legitimate, non-discriminatory reason for their promotion decisions. *Walker v. Nationsbank of Fla., N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995). The defendants' burden is one of production, not of persuasion. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Once the defendants have met their burden of production, the presumption raised by the prima facie case is rebutted, and the plaintiff must then persuade the trier of fact that the employer's proffered reason was not the true reason, and the plaintiff was a victim of intentional discrimination. *Hicks*, 509 U.S. 502, 113 S.Ct. at 2748-49 (1993).

The district court set out the factors of the Education Respondents' promotion system that the Petitioner felt discriminated against him on the basis of age:

1. That the new performance evaluation system put in place by the State Personnel Department in 1990 was less objective than the previous system, and that this lack of objectivity caused him to receive lower evaluation scores in some instances.

2. That the Disability Determination Division decided pursuant to an independent management review team recommendation to change the weight of an applicant's experience and training score from 80% of his or her overall grade to 60%.

3. That an applicant's experience and training score can "top out" after a certain number of years in the same position. R3-68-6.

In response to the allegations, the Education Respondents articulated three business reasons for their promotion decisions: (1) the two persons chosen for promotion were the persons deemed most qualified for the positions, (2) the changes with regard to the evaluations were made pursuant to, and in compliance with, State Personnel Board procedures, and (3) the changes to the percentage given training/experience were made pursuant to recommendations of an independent management review team.

The Petitioner does not dispute any of the reasons proffered by the Education Respondents for their promotion decisions, or show that they were untrue and constituted a pretext for age discrimination. Rather, when questioned regarding any facts to demonstrate that the promotion decisions were made in order to discriminate against him on the basis of age, the Petitioner acknowledged he had no facts to support his claim, but stated that is simply what he believes. R1-9-Moody Depo. 23-24; 68-69. These beliefs, absent concrete evidence, do not support his allegations that the decisions were motivated for discriminatory reasons. No evidence was offered by the Petitioner to prove pretext nor is there any evidence showing the Education Respondents' actions were motivated by age.

This Court has set out the inquiry a court must make in age discrimination cases:

> In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. . . . Whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.
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> * * *
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> Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." *Western Air Lines, Inc. v. Criswell*, 472 U. S. 400, 422 (1985). The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S. Ct. 1701, 1706 (1993) (citations omitted).

All persons on the Certificate of Eligibles were considered for promotion. R1-9-Taylor Depo. Ex. 7-2. Mr. Methvin and Mr. Stewart were selected because they met the qualifications for the particular positions. This analysis exemplifies the process for making legitimate, non-discriminatory employment decisions. *Hazen, supra.*

II. THE PETITIONER DOES NOT POSSESS A CONSTITUTIONALLY PROTECTED RIGHT TO A PARTICULAR RANKING ON A CERTIFICATION OF PERSONS ELIGIBLE FOR PROMOTION

The trial court, following the Eleventh Circuit's decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), determined that the Petitioner has not articulated a substantive due process right. R3-68-16. The Petitioner insists, however, that he has a substantive due process right to a high numerical ranking on the certification of persons eligible for promotion. Such a right does not exist in state law, and it certainly does not rise to the level of a right protected by the United States Constitution.[1]

In *McKinney*, the Eleventh Circuit explained the need to depart from its own precedent and embrace this Court's holding that state employment decisions are not covered by substantive due process:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh facts that numerous mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such

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[1] The Petitioner cites *U.S. v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970) as support for his argument that a particular ranking on the Certificate of Eligibles is protected by the Fourteenth Amendment's Due Process Clause. Petitioner's Brief, pp. 5, 14. The *Frazer* case addressed unequal treatment in hiring on the basis of race, and therefore it is not relevant to the Petitioner's substantive due process argument.

> error. In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of employees' constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Id. at 1559, quoting *Bishop v. Wood*, 426 U.S. 341, 349-50, 96 S. Ct. 274, 280, 48 L. Ed. 2d 684 (1976).

The Due Process Clause protects only *substantive* rights that are "fundamental," which are those rights the Supreme Court has "deemed implicit in the concept of ordered liberty," such as most rights enumerated in the Bill of Rights and certain unenumerated rights, such as the penumbral right of privacy. *Id.* at 1556. Because employment rights are state-created rights and are not "fundamental" rights created by the Constitution, they are not protected by substantive due process. *Id.*

The Petitioner is asking this Court to second-guess the decisions made by the Education Respondents. He disregards the fact that, in spite of his protests, he was eligible for the promotion to Disability Determination Supervisor III. He was considered for the promotion, but two other persons were determined to be more qualified. The Petitioner does not agree with this decision, and he is asking this Court to review that decision pursuant to the substantive due process analysis of the Fourteenth Amendment to the U.S. Constitution. This is the kind of review expressly rejected by this Court. The Education Respondents are entitled to make personnel decisions

they deem to be the exercise of good business judgment, without fear of a disgruntled employee's fabrication of a substantive due process violation.

III. THE PROMOTION DECISIONS DID NOT SUBJECT THE PETITIONER TO VARYING TREATMENT, AND THUS DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE

The district court also determined that the Petitioner had not presented a cognizable claim under the Equal Protection Clause of the Fourteenth Amendment. R3-68-16-17. The Petitioner claims this finding was in error, because "[i]f indeed, these Defendants set out to deliberately deprive older persons of established rights by depriving them of the fruits of their lengthy experience, that effort would not only be irrational, but could also qualify as being callous." Petitioner's Brief, p. 16. The Education Respondents' decisions were based upon legitimate purposes, and did not violate any Equal Protection rights to which the Petitioner may be entitled.

This Court has determined that age is not a suspect class, and therefore, any allegations of age discrimination brought under the Equal Protection Clause should be examined under this test: whether the age-related classification is rationally related to furthering a legitimate state interest. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). This Court has held further that an age-related classification will be overturned only when " . . . the varying treatment of different groups or persons is so unrelated to the achievement of any combination of

legitimate purposes that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

In *Murgia*, this Court found that a statute requiring the mandatory retirement of Massachusetts State Police at the age of 50 did not deny the plaintiffs equal protection under the U.S. Constitution, because the classification was rationally related to the objective of assuring physical fitness. *Murgia* at 314. In *Vance v. Bradley*, the Court determined that a statutorily required retirement for foreign service officers at age 60 did not violate the Equal Protection Clause. *Vance* at 102. In this case, the Petitioner has failed to prove the existence of an age-related classification. He can offer nothing more than his own conclusions to support his allegation that an age-related classification exists. Even if the Education Respondents' decisions did constitute age-related classifications, their decisions were based upon a desire to evaluate all persons eligible for promotion on their merits and promote the persons most qualified for the positions.

CONCLUSION

The decision of the district court, affirmed by the Court of Appeals for the Eleventh Circuit, was one based firmly on case law well established by this Court. The decision does not present any issue compelling review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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